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IN THE

# Supreme Court of the United States

**October Term, 1972**

**No. 72-736**

JACK MILLER, a/k/a CHARLES MULLER,
*Petitioner,*

**vs.**

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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**October Term, 1972**

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JACK MILLER, a/k/a CHARLES MULLER,
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vs.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Jack Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on September 19, 1972.

### Opinion Below

The opinion of the Court of Appeals, dated September 19, 1972, is not yet reported. It is reprinted in the Appendix hereto, p. A-1, *infra*.

## Jurisdiction

Following a trial without a jury, the petitioner was found guilty on April 20, 1971 of violating § 501(c) and § 439(b) of the Landrum-Griffin Act, in the United States District Court for the Eastern District of Pennsylvania. On October 22, 1971 he was sentenced to one year probation and fined $500 by the Honorable Alfred L. Luongo.

The Court of Appeals for the Third Circuit affirmed the judgment of conviction on September 19, 1972, and this Court extended the petitioner's time for filing a petition for certiorari until November 18, 1972.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Questions Presented

1. Whether the use by a union officer of union-authorized increases in his salary and expenses for union purposes constitutes embezzlement, stealing, abstracting, or conversion of union funds within the meaning of § 501(c) of the Landrum-Griffin Act.

2. Whether the petitioner can properly be convicted of violating § 439(b) of the Landrum-Griffin Act where he accurately reports his gross salary on an LM-2 return filed with the Department of Labor.

## Statutes Involved

Section 501(c), Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U. S. C. § 501(c):

> "(c) Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, properties, or other assets of a labor organization

of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Section 431(b), Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 431(b):

"(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operation for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe."

Section 439(b), Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U. S. C. § 439(b):

> "(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

## Statement

The relevant facts, viewed in the light most favorable to the government, may be summarized as follows:

On June 22, 1970, a twelve-count indictment was filed charging Jack Miller and Raymond Oates with violations of § 501(c) (embezzling union funds) and § 439(b) (making false union reports), of the Landrum-Griffin Act.

After a trial before the Honorable Alfred L. Luongo, without a jury, in the United States District Court for the Eastern District of Pennsylvania, Raymond Oates was acquitted on all counts, and Jack Miller was convicted on one count of embezzling union funds and one count of making a false union report (counts I and V of the indictment).

### Jack Miller

Jack Miller, who is 56 years of age, is the Secretary-Treasurer of the International Brotherhood of Teamsters, Local 158, Allied Trades and Bulk Plant Workers, Amusement Park Workers, and Industrial Workers, located in Philadelphia, Pennsylvania. Local 158 has a membership of approximately 2,900 (298, 181a).* He attended the pub-

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* Numbers in parentheses refer to the original trial transcript. Numbers followed by an "a" refer to pages in the printed Appendix supplied to the Court of Appeals.

lic school system in West Philadelphia, completing three years of high school (206). Studying academic courses, Miller never had any formal training in bookkeeping or accounting (296).

### The Indictment

Since the petitioner was acquitted on ten counts of the indictment, including a conspiracy charge, it is necessary to discuss only counts I and V of the indictment, on which he was convicted.

Count I charged that between June 25, 1965 and July 23, 1965, the petitioner, as Secretary-Treasurer of Local 158, embezzled $1,050 from a bank account of Local 158, in violation of § 501(c) of the Landrum-Griffin Act.

Count V charged that he wilfully made a false entry in a required report of Local 158 in that he incorrectly listed $1,300 as a proper business expense of Local 158.

The magnetic highground about which all the government's evidence seems to cluster involved the disbursement of $1,050 in a series of checks (Government Exhibits 28 through 33) to Jack Miller. Although the petitioner took the stand and denied ever receiving some of these funds, the court found to the contrary. Consequently, for purposes of this petition, we are prepared to assume without conceding his receipt of these moneys.

### Miller's Additional Compensation

Jack Miller normally received $9,100 a year, or $175 a week as his regular salary (22a). However, from time to time the executive board had authorized additional compensation for services rendered or unusual expenses incurred (78a, 115a, 126a).

The government claimed that Jack Miller was overpaid $1,050 during an approximate six-week period in 1965 (June 4, 1965 through July 22, 1965) and that this extra compensation was unauthorized. However, an amended LM-2 form filed by the union in 1970 openly revealed that that the petitioner had received $10,150 in salary for the year 1965, which included the so-called overpayment of $1,050 (30a, 135a).

Because the petitioner and Raymond Oates, the President of Local 158, were frequently engaged in out-of-town organizational activity, blank checks were signed by both men and left with the union bookkeeper to meet day-to-day needs (106a, 107a). There were a number of occasions when the petitioner incurred normal organization expenses but was not reimbursed by the union (65a). Moreover, at the end of 1966 the union owed Jack Miller $6,525 toward his authorized salary increments (79a).

Jack Miller testified that he never received any funds from the union which were not authorized (116a, 121a). This sworn testimony was unimpeached and uncontradicted.

### The Second Amended LM-2 Return

In 1965 the union filed an initial LM-2 return, a form of general information required by the Labor-Management Reporting and Disclosure Act to be filed with the Department of Labor. Subsequently, an amended LM-2 return was filed effecting certain technical changes (74a). According to Miller, the union was advised by its former accountant that the Department of Labor had approved its 1965 LM-2 return as amended (119a). However, pursuant to the government's request, a second amended LM-2 return was filed on June 4, 1970 (73a).

The second amended LM-2 return fully disclosed all salary payments to Jack Miller in Schedule 8 (135a), and the additional $250 (the difference between the $1,300 charged in Count V of the indictment and the alleged salary overpayment of $1,050) in organizing expenses found in Schedule 14 (135a). Presumably the $250 was the amount charged in Count II dealing with a testimonial dinner for Raymond Oates, the President of Local 158 (190-191, 195a).

The government contended, however, that Miller had been paid $7,700 in salary in checks drawn on the Broad Street Trust Company and $2,450 in salary in checks drawn on the Lincoln National Bank, for a total of $10,150 (32a, 133a). The initial LM-2 return showed Miller's expenses as $6,409 (76a). The second amended LM-2 return also showed Miller's expenses as $6,409, which the government claimed was a duplicitous and fraudulent entry of the $2,450 withdrawn from the Lincoln National Bank checking account (32a).

As noted above, the Court of Appeals for the Third Circuit affirmed the judgment of conviction on September 19, 1972. On October 2, 1972 Mr. Justice Brennan approved an enlargement of time in which to file this petition through and including November 18, 1972.

**Reasons for Granting the Writ**

The decision below raises a critical and novel question as to the proper interpretation and application of § 501(c) and § 439(b) of the Landrum-Griffin Act. The inherent importance of the question, combined with the substantial impact of the answer upon the internal operations of all labor organizations in the United States, justifies full review of the case by this Court.

The broad ruling of the court below that § 501(c) prohibits the charging on the union books of false and fictitious items under the guise of legitimate salary and expense accounts reflects, particularly in light of the facts of this case, a most questionable and danger-laden reading of both § 501(c) and § 439(b). That ruling stemmed from a record which, viewed most favorable to the government, showed use by the officers of increments authorized through executive board action for furthering union purposes. Since these two sections involve different considerations, we will discuss first § 501(c).

The statutory problem is whether the use by an officer of such authorized salary in the performance of his duties as representative of the union constitutes the kind of action which § 501(c) was designed to outlaw. Section 501(c), by its own terms, is concerned solely with the union officer or employee "who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another," any of the moneys or assets of the union which he serves.

This statutory language must be read and applied in light of the fact that the Landrum-Griffin Act, while imposing various limitations and sanctions on unions and their officers, was not intended by Congress as an open invitation to judges, or for that matter, juries, to render their own unhibited judgments as to the morality or even the legality of any and all union expenditures. Consistent with the careful and delineated proscription of specified practices, Congress intended the widest possible preservation of union practices and internal proceedings. As has been said on another occasion by the Second Circuit, *Gurton* v. *Arons*, 339 F.2d 371, 370 (2d Cir. 1964):

> "The provisions of the L.M.R.D.A. [Landrum-Griffin Act] were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of the unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations." (339 F.2d at 375)

But the broad and confused reading given § 501(c) in this case invites the "officious intermeddling" in the internal affairs of unions which the *Gurton* decision condemned, and permits indiscriminate speculation by judges into the good faith nature of all union financial transactions. Without bothering to analyze the undisputed facts or their statutory implications, the court below apparently accepted the government's theory of the case that since Jack Miller's regular salary was $9,100 per year, the additional $1,050 constituted a theft. Thus, under the court's holding, every payment or commitment by a union to one of its officers is a potential embezzlement, at least if the transaction is erroneously entered on the union books in the form of salary or expense items. And such payment is apparently an embezzlement even though the union's governing body authorized or approved the transaction and the bookkeeping techniques.

While the government demonstrated that the petitioner's salary was $175 per week, it failed to prove that Miller received any payments which were not authorized by the

executive board. Miller's testimony that all payments to him were authorized is undisputed. As an example, the government challenged the disbursement of $250 intended for Raymond Oates' testimonial dinner (2a-3a, Count II). However, there was no proof that these funds were unauthorized or used for any other purpose. Thus, the trial court acquitted Oates of causing the $250 to be paid without authorization. The $250 constituted the balance of the $1,300 alleged in Count V to have been improperly reported in the second amended LM-2 return. Surely the same conclusion should have been reached in regard to Miller.

Local 158, as with other unions, has a history of executive board resolutions authorizing expenditures for realized and anticipated expenses and increments in officers' salaries (78a, 115a, 126a). In the absence of proof to the contrary, there is no reason to believe that the funds which are the subject of Counts I and V were not authorized by the executive board, particularly where the court found most of the payments to have been authorized and the other payments were openly reported on the LM-2 return filed in June of 1970.

Placed in proper perspective, the government here completely failed to prove a lack of authorization for the various disbursements properly reported in the amended LM-2 return.

Under these circumstances, the whole thrust of § 501(c) is dangerously altered. It becomes a threat which Congress never intended, a menace to all unions and union officers that what some jury or judge may conceive to be an improper accounting procedure may result in an embezzlement or conversion conviction. Such a threat will inhibit the pursuit of lawful and constitutional objectives. In this very case, the government never claimed that Jack Miller did anything but honestly and vigorously advance the

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best interests of Local 158, for which he was duly compensated. The union and Jack Miller were pursuing a fundamental and protected right within normal and common union objectives.

When a union and its officers are in pursuit of such basic rights and authorize the expenditure of money to one of their long-standing officers, courts must take care that § 501(c), or any other federal statute, is not so broadly interpreted as to inhibit those rights. Cf. *Smith* v. *California*, 361 U.S. 147, 155 (1959).*

Properly interpreted and applied, the proscriptions of § 501(c) can be made effective without such an inhibitory effect. By limiting the concepts of embezzlement, stealing, abstracting, and conversion to those takings that are unauthorized by the union and serve only private rather than union purposes, the inhibitory effect is removed.

To read § 501(c) as confined to unauthorized takings for purely private purposes is not only consistent with the general rule favoring strict construction of criminal statutes but is mandated if due respect is to be paid to all the interrelated provisions and titles of the Landrum-Griffin Act. See *Calhoon* v. *Harvey*, 379 U.S. 134, 139-140 (1964). Section 501(c) simply was not meant to be the equivalent of or a substitute for the financial standards imposed on unions and union officers by § 501(a) or § 201. There is no practical or legal justification for expanding the interpretation of § 501(c) so as to overlap the other provisions. Cf. *Gilbert* v. *United States*, 370 U.S. 650, 658 (1962).

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* In the *Smith* case, this Court warned that obscenity statutes must be so framed and applied as not to have "a tendency to inhibit constitutionally protected expression." As was said in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963), "The threat of sanctions may deter . . . exercise [of First Amendment freedoms] almost as potentially as the actual application of sanctions."

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In other words, § 501(c) is a straightforward embodiment of proscriptions that have always been a part of our general criminal jurisprudence—an outlawry of surreptitious, unauthorized takings of money or property of a person or organization for one's own private use, or for the private use of another. The statutory concepts of embezzlement, stealing, abstracting and conversion all have long-standing meanings that possess the common feature of unauthorized takings for private use. See *United States* v. *Turley*, 352 U.S. 407, 411-413 (1957); *Morissette* v. *United States*, 342 U.S. 246, 271-273 (1952); *Grin* v. *Shine*, 187 U.S. 181, 189 (1902); *Moore* v. *United States*, 160 U.S. 268, 269-270 (1895).* And when Congress enacted § 501(c) it was merely making federal offenses, insofar as union officers and employees are concerned, out of what has always been outlawed under state law, to wit, the unauthorized takings for private use which are encompassed by the specified crimes. See also *United States* v. *Harmon*, 339 F.2d 354, 357 (6th Cir. 1964).

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* In *United States* v. *Northway*, 120 U.S. 327, 334 (1887), this Court noted that, to constitute the crime of abstracting, ". . . it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with intent to injure or defraud it . . ."

In *Grin* v. *Shine*, 187 U.S. 181, 189 (1902), it was said that "it is impossible for a person to embezzle the money of another without committing a fraud upon him."

Then Senator Kennedy made it plain that § 501 (c) does no more than make "embezzlement by any person of funds or assets of a labor organization a Federal crime." Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI, p. 1038.

Senator Goldwater pointed out that, "Embezzlement of any kind is already a crime in every State and Territory of the United States, and there is no evidence that these local laws are not being properly enforced. This provision gives union members nothing they do not already have." *Ibid.*, p. 1014; see also p. 1079.

But when union moneys or assets are given to bona fide union officers pursuant to union authorization and in accordance with some legitimate union purpose, the very essence of those long established criminal concepts disappears. That vacuum is not filled by evidence of additional compensation or even erroneous bookkeeping entries.

Of special significance in this case is the fact that Local 158's loose accounting methods were rectified without governmental intervention. Prior to the commencement of the government's investigation, the International union directed an audit of the Local's financial records (66a, 120a-121a). A change of accountants was arranged and a highly regarded CPA was retained to supervise the Local's bookkeeping procedures. Changes were advised by the new accountant and immediately implemented by the Local's officers (61a-62a).

The new accountant, who was of unquestioned integrity, found that there had been no misappropriation of union funds and in fact concluded that the union owed the petitioner substantial back pay (79a).

Surely the Local's ready acceptance of the International's assistance made the government interference here both unwarranted and unauthorized.

Certiorari should accordingly be granted to restore § 501(c) to its true, limited meaning. Only this Court's action can remove the threat to all labor unions imposed by the decision below. And only then can unions safely pursue their legitimate goals without fear that the propriety of their financial transactions will later be second-guessed in criminal proceedings that are not designed for that purpose.

A similar threat to unions is posed by the application of § 431 and § 439(b) in the present case. The basic purpose of those sections is to fairly apprise union members of the financial affairs of their union, thus providing information useful in their election procedures. Senate Report No. 187, 86th Cong. 1st Sess., 2 U.S. Code Cong. & Adm. News, 1959, pp. 2318, 2332-2333; *United States* v. *McCarthy*, 422 F.2d 160, 163 (2d Cir. 1970). As the Second Circuit observed in *McCarthy*, the Senate Report explained:

> "'By requiring reports on such transactions and by requiring other types of reporting under other sections of the bill, the committee is not to be construed as necessarily condemning the matters to be reported if they are not specifically declared to be improper or made illegal under other provisions of the bill or other laws. Reports are required as to matters which should be public knowledge so that their propriety can be explored in the light of known facts and conditions.'" (422 F.2d at 163)

In *McCarthy* the appellant had failed to disclose compensation received from a labor consultant to an employer having contracts with the union of which McCarthy was business manager.

In another appropriate application of § 439 the Seventh Circuit affirmed the conviction in *United States* v. *Haggerty*, 419 F.2d 1003 (7th Cir. 1969). In *Haggerty* the appellant withdrew $25,000 from the union checking account for the ostensive purpose of depositing the money in an interest-bearing savings account. Instead, Haggerty used the funds to pay a personal financial obligation and purposely prevented this transaction for surfacing at subsequent union meetings. Frightened by a Department of Labor subpoena, Haggerty deposited $25,000 in the union savings account several months later and falsified the union records. Clearly, in *Haggerty* the appellant was

guilty of the type of conduct Congress specifically intended to prohibit by means of § 431 and § 439.

No similar situation exists here, for the petitioner in no way misrepresented the payment of union funds for unauthorized purposes. To the contrary, we find § 439 misapplied here in a case involving a man who has devoted many years and considerable energy to his union's interests. Moreover, it is uncontradicted that the union owes the petitioner substantial sums for services performed over the years on behalf of the union (115a).

Unfortunately, the Court of Appeals misconstrued the meaning of § 439(b) when it held:

> "The false statement [in the second amended LM-2 return] is made out by the inclusion in the salary schedule of payments knowingly received in excess of that authorized." (Appendix A-7, *infra.*)

This incomprehensible application of § 431 and § 439(b) completely destroys the meaning of those sections, for it condemns the petitioner for reporting under "Gross Salary" the very amount which the government now claims he received for salary. The court's holding leaves the petitioner stranded between Scylla and Charybdis, uncertain as to what constitutes a proper return. The court's holding is particularly onerous in light of the primary purpose of § 431 and § 439(b), namely to fully inform the membership of the union of these relevant disbursements.

The application of § 439 here distorts the clear intent of Congress in enacting that section and constitutes a governmental intrusion into union affairs never contemplated by Congress. Such an application imperils the sovereignty of literally thousands of unions throughout the country and should compel this Court to grant a writ of certiorari.

## Conclusion

The shame and disability suffered by the petitioner following a conviction of this nature are well known to this Court. The grave consequences of this conviction are that a union officer has been condemned and branded for life as a person unworthy of trust or confidence. The realization that Jack Miller, who has led an exemplary life for fifty-six years, has been struck down because he did no more than perform his duties as a union officer is reason enough to grant a writ of certiorari. But, as we must acknowledge, to this extent his grievance is a private one.

Of much greater importance should be the awesome realization that a conviction of any union officer under these circumstances imperils the nation's whole union movement. The right of unions to dispense their funds and pay their officers as they see fit must be preserved just as much as these liberties are sanctioned for leaders of the country's large corporations.

Our early history is littered with the wreckage of unions and union leaders strewn upon the altars of our courts. No informed member of this Court can be other than unhappy about that dark chapter in American history. The resurgence of the use of these criminal provisions to persecute unions and their officers poses a real threat to the democracy of our unions.

Therefore, this Court must recognize how these low visibility convictions can be used by the Government as a handy implement for interfering with legitimate union operations. To give legal sanction to what was done to this union officer, without accepting the grave implications which will threaten every union in the country, would be unthinkable.

For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## Opinion of the Court

[Filed September 19, 1972]

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 71-2098

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UNITED STATES OF AMERICA,

v.

RAYMOND A. OATES, JACK MILLER, a/k/a CHARLES MULLER, JACK MILLER,

*Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Argued April 4, 1972

Before: Seitz; *Chief Judge,* and Hunter, *Circuit Judge;* and McCune, *District Judge.*

By McCUNE, *District Judge*

Appellant Jack Miller was indicted for various violations of the Labor Management Reporting and Disclosure Act of 1957, 29 U.S.C.A. § 401, *et seq.,* (LMRDA). In a non jury trial Miller was convicted of embezzling $1050.00 in union funds in violation of § 501(e) LMRDA, 29 U.S.C.A.

§ 401(c)[1] and of making a false statement on an LM-2 report in violation of 209(b) LMRDA, 29 U.S.C.A. § 439 (b).[2]

Miller had been Secretary-Treasurer of Local 158 of the Brotherhood of Teamsters in Philadelphia since 1963. His authorized salary for 1965 was $175.00 per week or $9100.00 for the year. During an investigation of the financial affairs of the union a Labor Department investigator found that Miller's salary was not paid in normal weekly sequence at the rate of $175.00. There were gaps in the dates upon which the salary was paid during 1965 (P. 16a). The union maintained a cash disbursements journal where disbursements were recorded under various headings or descriptions including salary and this journal revealed only one bank account, upon which checks were drawn, an account in the Broad Street Trust Company herein called the regular account. It was apparent that Miller had been paid only $7700.00 from the regular account. The investigator, R. G. Lyon, became aware that another account must have existed and inquiry of the union accountants revealed an account in the Lincoln National Bank herein called the

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[1] "(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both." 29 U. S. C. A. § 501(c).

[2] "(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both." 29 U. S. C. A. § 439(b).

Lincoln account, not disclosed by the union's books. From this account Miller received $2450.00 in 1965 as salary or a total from both accounts of $10,150.00.

The manner in which Miller was paid was unusual. For example, on June 25, 1965, he signed two checks, one from each account. The check drawn on the regular account was for $434.76 (three weeks pay or $525.00 reduced by payroll taxes) but the one on the Lincoln account was for $525.00. About one month later on July 22, 1965, he drew a check on the regular account for $579.68 ($700.00 or four weeks pay less payroll taxes) and on the same day drew a check for $175.00 on the Lincoln account. Meanwhile he had drawn weekly payments from the Lincoln account in the amount of $175.00 on July 1, July 8, and July 15, 1965.

All checks issued by the union were required to carry the signatures of Miller and the local president, Raymond A. Oates. Miller admitted signing all checks but contended that he and Oates merely signed checks in blank when requested to do so by the bookkeeper, Mrs. Busch. However a stipulation was introduced that Mrs. Busch, if called, would testify that Miller directed what was to appear on check vouchers as the stated purpose for which the checks were drawn.

The original LM-2 form for the year 1965 showed that Miller was reimbursed for expenses in the amount of $6409.00 but that figure included the $2450.00 he had received as salary from the Lincoln account leaving $3959.00 as actual expense for which Miller was presumably reimbursed. The form did not disclose the $2450.00 as salary and of course the $2450.00 included the excess $1050.00

which Miller had drawn over and above the salary of $9100.00 to which he was entitled. The original form showed salary paid Miller to be $7700.00, the total of the checks drawn on the regular account.

The LM-2 form was amended twice and the second amendment, the one in issue, showed salary of $10,150.00 which was the amount received by Miller in 1965. However the amended form continued to show that Miller had been reimbursed expenses in the amount of $6409.00 and thus either one figure or the other was in error.

The investigator prepared an exhibit showing the checks drawn on the regular account and the checks drawn on the Lincoln account, Exhibits GiA and GiB respectively which was introduced in evidence.

Miller's defense as to the conversion was that while he had signed the checks, he had not actually received the excess funds to the best of his knowledge and that the government was obligated to show that he had received the excess funds. His defense was centered on eight checks. He denied the endorsement on eight checks, four of which were introduced in evidence and four of which were not introduced.[3] The total of the checks on which the endorse-

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[3] The endorsements on the backs of two groups of checks were contested. The first group consisted of four checks which were made a part of the record. They were the following, all drawn on the general account:

Check #4636 for $434.76 (3 weeks at $175.00—less withholding) dated June 25, 1965—Exhibit D-1.

Check #4801 for $182.96 (1 week plus some unknown amount) dated September 16, 1965—Exhibit D-2.

Check #4968 for $151.26 (1 week less withholding) dated November 5, 1965—Exhibit D-3.

(Footnote continued on following page)

ments were denied was $2275.00. (He admitted the endorsement on two of the checks drawn on the Lincoln account which were not received in evidence).

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(Footnote continued from preceding page)

Check #5147 for $151.26 (1 week less withholding) dated December 17, 1965—Exhibit D-4.

(The defendant denied the endorsement on all of the above checks. The labor department investigator ventured a guess that #4636 bore Miller's endorsement. He said the endorsement on #4801 did not appear to be Miller's. He said the endorsement on #4968 seemed similar to Miller's signature. He said the endorsement on #5147 did not appear to be Miller's endorsement).

The second group of checks consisted of six checks which were not made a part of the record but they were a part of Exhibits Gia and these checks were referred to in the testimony (p. 123a to p. 125a).

One of the checks #4694 for $579.68 ($700.00 less withholding) dated July 23, 1965, Exhibit G28 was drawn on the general fund. On this check Miller denied that the endorsement was his.

The other five checks were drawn on the special (Lincoln) account and were as follows:

Check #6 for $175.00 dated July 1, 1965, Exhibit G29 (endorsement denied).

Check #8 for $175.00 dated July 8, 1965, Exhibit G30 (endorsement denied).

Check #101 for $175.00 dated July 15, 1965, Exhibit G33 (endorsement denied).

Check #103 for $175.00 dated July 22, 1965, Exhibit G31 (endorsement admitted).

Check #105 for $175.00 dated July 22, 1965, Exhibit G32 (endorsement admitted).

The government investigator was not asked about his opinion of the endorsements on the four checks in this group.

In addition, on June 25, 1965, Miller received Check #4 for $525.00 (three weeks salary not reduced by withholding) from the Lincoln Account upon which the endorsement was not denied.

Miller drew from the Lincoln account six additional checks, Nos. 108, 110, 114, 116, 118 and 121, each for $175.00, none of which were reduced by withholding and on which there was no denial of the endorsement.

The checks drawn on the Lincoln account were considered salary because Miller did not defend on the basis that they were for expenses or for any other purpose.

His defense as to the LM-2 report was that he had made no entries on the report but had relied on the union's accountant who had prepared the form and that the salary stated was the salary actually paid.

The court found Miller guilty of the embezzlement of six salary payments of $175.00 finding that he had received the payments being well aware that they were duplicate payments and being persuaded in great measure by the number of payments and the amounts of those payments during June and July of 1965. The court also found Miller guilty of making a false entry on the LM-2 report.

On appeal Miller argues that his conviction must be reversed because there was insufficient evidence of his receipt of the proceeds from the contested checks, that he made no entries on the LM-2 form but relied entirely on the accountant, that the salary shown on the form was in fact correct and finally that the court erred in considering the checks which were not introduced in evidence.

In review of appellant's conviction, the government is entitled to every favorable inference reasonably consistent with the evidence, United States v. Stubin, 446 F.2d 457 (3d Cir. 1971).

Miller argues that he did not receive the excess funds to the best of his knowledge. To support this denial he points to the unclear endorsements on the four checks admitted in evidence. He denies the endorsements on four additional checks. His argument is that someone could have made these checks (signed in blank) to his order and then have cashed the checks without his knowledge.

But his credibility was for the fact finder and the endorsements on the four checks in evidence were for the fact finder to consider in comparison with his signature as the maker. In view of the fact that two of the endorsements on the checks admitted in evidence appeared to be Miller's and in view of the fact that he admitted receiving and endorsing checks on the Lincoln account we believe the trial court was justified on this record in concluding that the endorsements on the contested checks were those of Miller and that Miller received the money.

We find no error in the court's consideration of the checks which were not introduced in evidence. The checks were listed on the schedules heretofore identified (G1A and G1B) which were admitted in evidence. The checks themselves were merely cumulative.

As to the conviction for making a false entry on the amended LM-2 report it is unquestioned that the report listed salary paid as $10,150.00 while the authorized salary for 1965 was $9100.00 we conclude that the salary schedule on the LM-2 form necessarily calls for a statement of the properly authorized salary. The false statement is made out by the inclusion in the salary schedule of payments knowingly received in excess of that authorized. While it is true that the accountant for the union prepared the form the defense of reliance on the accountant is not applicable in view of the trial court's conclusion that appellant was guilty under 501(c). The trial court had determined that appellant had received money to which he was not entitled and had received it from a source that was not disclosed by the union's records. The accountant

testified that there were in fact no union records of such account and this made it impossible to file a factual report. Defendant had created the undisclosed account or knowingly had permitted it to exist and had drawn funds from it.

Under such circumstances appellant's asserted reliance on the accountant cannot be recognized as a valid defense. Such defense is available only when one fully discloses to the professional relied upon all relevant information, United States v. Cox, 348 F.2d 294 (6th Cir. 1965).

The judgment will be affirmed.

To the Clerk:

Please file the foregoing opinion.

/s/ Barron P. McCune,
*United States District Judge.*

BLURRED

**Judgment**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2098

UNITED STATES OF AMERICA

vs.

RAYMOND A. OATES, JACK MILLER a/k/a CHARLES MULLER, JACK MILLER,
*Appellant.*

(D. C. Criminal No. 70-329)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Seitz, Chief Judge and Hunter, Circuit Judge and McCune, District Judge.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 22, 1971, be, and the same is hereby affirmed.

ATTEST:

/s/ THOMAS F. QUINN,
*Clerk.*

September 19, 1972.

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